SUPREME COURT, U. S. JAN 19 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-959

CHARLES FRIEND,
Petitioner,

vs.

IRWIN R. LIPPMAN, THOMAS A. WADDELL, and THOMAS D. O'MALLEY, JR., Individually, and as INSURANCE COMMISSIONER and TREASURER of Florida, and ROYAL INDEMNITY COMPANY, a foreign corporation,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

ANNE CAWTHON BOOTH
BOOTH & BOOTH, P. A.
Post Office Box 1388
Tallahassee, Florida 32302

JOHN LEWIS HALL, JR.
HARTWELL AND HALL
Post Office Drawer 840
Tallahassee, Florida 32302

Attorneys for Respondent, Royal Indemnity Company

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, ROYAL INDEMNITY COMPANY, respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari, pursuant to Rule 24, Supreme Court Rules, for the purpose of disclosing matter or grounds why the cause should not be reviewed by this Honorable Court.

OPINION BELOW

The decision sought to be reviewed is reported at 277 So.2d 318. (Petitioner's Appendix No. 1)

JURISDICTION

This cause should not be reviewed by this Honorable Court for any one of the following reasons:

1. No federal question was decided below.

2. Independent, non-federal grounds support the decision below.

3. No question of the constitutionality of any treaty or statute of the United States or of any state statute is involved and Petitioner has failed to show any title, right, privilege or immunity under federal law.

4. The decision sought to be reviewed, although involving state law, is in accord with corresponding federal law and with decisions of this Court.

QUESTION PRESENTED

Whether the decision sought to be reviewed is within the jurisdiction of the Court under Title 28, Section 1257 U.S.C. and properly subject to review under Rule 19, Supreme Court Rules.

STATEMENT OF CASE AND FACTS

Petitioner herein, Plaintiff below, seeks compensatory and punitive damages in a civil tort action against THOMAS D. O'MALLEY, JR., Insurance Commissioner and Treasurer of the State of Florida, and his bonding company, ROYAL INDEMNITY COMPANY, Respondents herein. The Complaint and Amended Complaints allege that Petitioner was wrongfully removed by the Respondent/Commissioner from Petitioner's appointed position as

Director of the Division of Rehabilitation and Liquidation of the Insurance Department. (Respondent's Appendix page A13; Petitioner's Appendix page 16) Petitioner was appointed by Respondent O'MALLEY'S predecessor in office and was removed by Respondent O'MALLEY from the position shortly after Respondent O'MALLEY was elected and assumed office as Insurance Commissioner and Treasurer. The Complaints allege that Petitioner's removal was occasioned by his refusal to commit improper and illegal acts.

The Circuit Court dismissed the original Complaint as to Respondent O'MALLEY on the grounds that Petitioner's position was exempted from career service pursuant to *Florida Statutes* §110.051(2)(h) (Respondent's Appendix pages A8-A9), as a policy-making position, and that he served at the will of Respondent O'MALLEY, who could discharge him at any time without cause. (Petitioner's Appendix page 10) Petitioner's first motion to amend the Complaint (Respondent's Appendix pages A20-A21) was granted by order of the court. (Respondent's Appendix pages A22-A23) No claims of constitutional infringement were added by this amendment.

Thereafter, Petitioner filed for a Motion for Rehearing, Clarification and for Leave to Amend, alleging that the filing of the proposed second Amended Complaint would not change or introduce new issues. (Petitioner's Appendix page 14) The second Amended Complaint, however, alleged for the first time that Petitioner's removal from the position in question constituted a deprivation of due process of law, the right of freedom of speech, the right not to be punished or suffer retaliation because of the exercise of constitutional rights, the right to personal liberty, the right to pursue employment, the right to practice one's profession, et cetera. (Petitioner's Appendix pages 20-21)

The Circuit Court ruled that no useful purpose would be served by allowing the amendment as to the Defendants, O'MALLEY and ROYAL INDEMNITY COMPANY. The Circuit Court reaffirmed its decision that Plaintiff, Petitioner herein, served at the will of Respondent O'MALLEY and his discharge could not form the basis of a tort action for damages. (Petitioner's Appendix page 26) In denying the Motion to Amend, the Circuit Court made the last, and only, ruling relative to any alleged constitutional infringement, stating simply that Petitioner's discharge was not in violation of "any constitutional right of" Petitioner. (Petitioner's Appendix page 28)

On appeal to the Florida District Court of Appeals, First District, the order of the trial court dismissing the Amended Complaint was affirmed. The opinion of the District Court, herein sought to be reviewed, states two reasons for upholding the decision of the lower court:

(1) That Petitioner's position was exempted from career service under *Florida Statutes* §110.051(2)(h), because the nature of the position was policy-making in character;

(2) That public officials are immune from tort liability arising out of the removal of employees. (Petitioner's Appendix page 10)

No federal questions are discussed or otherwise involved in the District Court's decision. Federal authorities are cited in support of the sovereign immunity basis for the decision, ground (2), supra.

Thereafter, on May 9, 1973, Petition for Rehearing was filed in the District Court, which Petition sought rehearing on the two grounds of the District Court's opinion, to-wit:

(1) Exemption from career status under *Florida Statutes* §110.051(2)(h); and

(2) Sovereign immunity.

No federal question was asserted in this Petition for Rehearing. (Respondent's Appendix page A1)

Following the District Court's denial of the Petition for Rehearing, the cause was taken to the Florida Supreme Court and Petition for Writ of Certiorari was denied by order of that Court, dated September 28, 1973, on the grounds that the Court was without conflict jurisdiction. (Respondent's Appendix page A7)

Petition for Writ of Certiorari in this Court followed raising three questions (Petitioner's Brief, page 3) which, briefly restated, are as follows:

(1) The right of Petitioner not to be involuntarily removed from his position;

(2) The liability of Respondent O'MALLEY'S bonding company;

(3) The legality of a determination by the court, without trial by jury, that Petitioner was exempt from state career service status.

These questions will be treated in the Brief in Opposition for the purpose of demonstrating to the Court that no substantial federal question is involved and no review by this Court is available to Petitioner under Title 28, Section 1257(3), U.S.C.

ARGUMENT

(1) No Federal Question of Substance Was Involved in the State Court's Decision Affirming the Dismissal of Petitioner's Complaint for Damages.

Petitioner has failed to demonstrate that any substantial federal question was involved in the dismissal of his Complaints for civil damages due to the alleged tortious actions of Respondent/Commissioner, in removing Petitioner from his position as Director of the Division of Rehabilitation and Liquidation of the Florida Insurance Department. The Petition is devoid of any specific jurisdictional allegations or citations of authority showing entitlement to review by this Court. Instead, the Petition confirms the existence of at least two independent, non-federal grounds, either of which fully supports the decision below.

Title 28, Section 1257(3), U.S.C. allows review by certiorari in this Court of final judgments or decrees rendered by the highest court of a state in which a decision could be had, where the validity of a treaty or a state or federal statute is drawn into question as repugnant to the Constitution, treaties or laws of the United States or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or authority exercised under, the United States.

At the outset, it should be noted that *had* the validity of any statute or treaty or the construction of either the federal or state constitution been involved in the lower state courts, direct appeal, as a matter of right, to the Florida Supreme Court would have been available to Petitioner (Respondent's Appendix page A10), and the decision of the Florida Supreme Court would have then been the

only proper decision reviewable under Title 28, Section 1257, U.S.C. Since no such constitutional questions were decided below, direct appeal was not available to the highest state court and Petitioner chose to seek certiorari in the Florida Supreme Court alleging conflict with prior decisions of the state courts. This is further evidence that no substantial federal question was decided in the state courts.

Rule 19 of the Supreme Court Rules states that review by certiorari is not a matter of right but of sound judicial discretion. That Rule provides that certiorari will be granted only where there are special and important reasons therefor, as where a state court has decided a federal question of substance not theretofore determined by the court or has decided it in a way probably not in accord with the applicable decisions of this Court.

In *Henry* v. *State of Mississippi*, 379 U.S. 443, 13 L.Ed.2d 408, 85 S.Ct. 564, rehearing denied 380 U.S. 926, 13 L.Ed.2d 813, 85 S.Ct. 878 (1965), at page 466 of the official reports, a basic principle governing review of state court judgments was stated as follows:

> "It is, of course, a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, even where those judgments also decide federal questions."

In *Jankovich* v. *Indiana Toll Road Comm.*, 379 U.S. 487, 13 L.Ed.2d 439, 85 S.Ct. 493 (1965), at page 489 of the official reports, this Court stated:

> "It is undoubtedly ' "the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground

> is independent of the federal ground and adequate to support the judgment.'"

In the *Jankovich* case, the just compensation requirement of both the Indiana Constitution and the Due Process Clause of the Fourteenth Amendment of the United States Constitution were raised and were stated as a basis for the Indiana Supreme Court's decision which was sought to be reviewed. This Court found that the Indiana Constitution formed "an equal ground of decision" and stated, at 379 U.S. 492:

> "In such circumstances, even though a state court's opinion relies on similar provisions in both the State and Federal Constitutions, the state constitutional provision has been held to provide an independent and adequate ground of decision depriving this Court of jurisdiction to review the state judgment."

In *Mental Hygiene Dept. of California* v. *Kirchner*, 380 U.S. 194, 13 L.Ed.2d 753, 85 S.Ct. 871 (1965), at pages 197 through 198 of the official reports, this Court stated:

> "This Court is always wary of assuming jurisdiction of a case from a state court unless it is plain that a federal question is necessarily presented, and the party seeking review here must show that we have jurisdiction of the case.
>
> * * *
>
> An examination of the opinion of the California Supreme Court in the case before us does not indicate whether that court relied on the State Constitution alone, the Federal Constitution alone, or both; and we would have jurisdiction to review only if the federal ground had been the *sole* basis for the decision, or the State Constitution was interpreted under what the

state court deemed the compulsion of the Federal Constitution."

Applying the foregoing principles of law to the decision of the Florida District Court of Appeals, First District, herein sought to be reviewed, we find: (1) that the decision of the District Court does not decide any federal question of substance; (2) that the decision of the District Court expressly sets out two independent, sufficient, non-federal grounds for affirming the dismissal of the Complaint in this case; (3) that there is no federal question, either expressed in the District Court's opinion or impliedly ruled on though not mentioned in the opinion, which can be termed either the sole basis of the opinion or a necessary basis of the opinion, as required by the decisions of this Court.

The Petition alleges generally that there is jurisdiction under Title 28, Section 1257(3), U.S.C. (Petition, page 2) but fails to point to any federal question of substance necessarily involved below. No authorities are cited in support of jurisdiction.

The Petition seeks to establish that the decision of the state court sought to be reviewed violates the First Amendment, freedom of speech, and the Fourteenth Amendment of the Constitution of the United States. (Petition, page 3) This is matter going to the merits, if any, of Petitioner's suit and not to the jurisdictional basis for review in this Court.

Three decisions of this Court are cited in support of the assertion that Petitioner had a constitutional right not to be terminated from his political, appointed position in state government. These decisions are *Perry* v. *Sindermann*, 408 U.S. 593, 92 S.Ct. 2693, 33 L.Ed.2d 570 (1972); *Board of Regents* v. *Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33

L.Ed.2d 548 (1972); and *Pickering* v. *Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

All three cases involved teachers who sought reinstatement or hearing on the charges causing their dismissal. None of the cases cited involve the removal of a political appointee following a change in administration in state government. None of the cases cited by Petitioner involve sovereign immunity from tort liability or specific statutory exemption from career service, both of which are involved here.

In *Perry* v. *Sindermann*, supra, a teacher whose contract was not renewed was found entitled to prove his claim to job tenure under the college's de facto tenure policy. In the *Perry* case, the teacher alleged that he and others legitimately relied on a binding tenure understanding fostered by the college administration.

Unlike the *Perry* case, Petitioner in the instant case is expressly exempt by statute from any tenure or career service status. Petitioner has conceded in the proceedings below that he has no contractual or statutory right to employment. (See Point (3), infra, page 13 of this Brief) Since his appointment was political, by Respondent O'MALLEY'S predecessor in office, and was a policy-making position, he had no reasonable expectation of retaining the position after change in administration following Respondent O'MALLEY'S defeat of his predecessor in office in a state-wide campaign. Petitioner was aware of these facts at the time he accepted the appointment bestowed on him by Respondent O'MALLEY'S predecessor in office.

In the *Pickering* case, supra, a tenured public school teacher was dismissed, after hearing, for writing a letter to the editor of a newspaper. He sought reinstatement chal-

lenging the constitutionality of the state statute under which he was dismissed. This Court reversed and remanded holding his dismissal could not be upheld absent proof that he knowingly or intentionally made false statements.

In *Board of Regents* v. *Roth*, supra, an untenured school teacher sought declaratory and injunctive relief requiring the university to give him notice of the charges against him and the right to a hearing. The lower federal courts ruled in the teacher's favor. This Court reversed, holding that the words "liberty" and "property" must be given some meaning and due process requirements are "not infinite". In *Roth*, this Court stated, at pages 577 through 578 of the official reports:

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.
>
> * * *
>
> Thus, the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment."

The *Perry*, *Pickering* and *Roth* decisions, supra, form no basis for this Court's jurisdiction here because the state court decision sought to be reviewed is in accord with, and does not violate any principles of law set forth in, those decisions.

(2) No Federal Question of Substance Was Involved in the State Court's Decision That the Bonding Company's Liability Is Co-Extensive with That of Respondent O'Malley.

This point, mentioned on page 3 of the Petition, is not argued or discussed anywhere in the Petition. Due to the fact that the state courts unanimously found no cause of action against Respondent O'MALLEY, there was no necessity for any ruling on the specific points raised by Respondent ROYAL INDEMNITY COMPANY pertaining to its liability. These questions involve the specific provisions of the bond and the effective date of the bond being subsequent to the acts alleged to have brought about Petitioner's discharge from his position.

These issues are not involved in the case at this time since they have never been determined by the courts below. There is no ruling, express or implied, in connection with the liability of the bonding company, which can form the basis for this Court's jurisdiction under Title 28, Section 1257, U.S.C.

(3) No Federal Question of Substance Was Involved in Petitioner's Third Question.

The third question presented in the Petition (Petition, page 3) is the "legality" of a determination by the courts of Florida, without trial by jury, that Petitioner was exempt from state career service status. Petitioner is not entitled to raise this question, and it deserves no consider-

ation by this Court, since Petitioner conceded during the proceedings below that he was *not* covered by the State Career Service Act. This is established by the order of the trial court dismissing the Complaint dated March 13, 1972, at paragraph 1 (Petitioner's Appendix page 2), as follows:

> "As to defendants, Thomas D. O'Malley, Jr., individually, and as Insurance Commissioner and Treasurer of Florida, and Royal Indemnity Company (defendant, O'Malley's, insurer), it appears that plaintiff's employment as Director of the Division of Rehabilitation and Liquidation of the Florida Department of Insurance was exempted from career service pursuant to Section 110.051(h), Florida Statutes, as a policy making job. (*This has not been disputed by plaintiff in the arguments.*)" (Emphasis supplied)

Also, in his first brief to the District Court of Appeals, Petitioner compared his position to that of an untenured school teacher (Respondent's Appendix page A11) and, on page 36 of this brief, expressly states: "Here the Plaintiff had no career service status." (Respondent's Appendix page A12) In his Reply Brief to the District Court, Petitioner states that he had no contractual or statutory right to employment. (Respondent's Appendix pages A18-A19)

CONCLUSION

Petitioner's Complaint and Amended Complaints for damages in tort based on his removal from a policy-making position in state government were dismissed by state courts on two independent, non-federal grounds. Petitioner first asserted constitutional infringement in the second amendment to his Complaint. His sporadic assertions in this regard are vague and were an incidental, rather

than a primary, part of the proceedings below. The state decision sought to be reviewed is based on adequate, independent state grounds and does not expressly or impliedly rule on any federal question.

In addition to adequate state grounds of statutory construction and sovereign immunity, expressly ruled on by the courts below, the doctrine of separation of powers is involved here. An elected public official must have the right to hire and fire certain policy-making employees, a fact the Florida Legislature realized in exempting such positions from career service. Respondent in the instant case is directly responsible at the ballot box for the performance of his executive functions. These functions, which include appointment, promotion and removal, are not within the jurisdiction of the courts in suits of this nature.

Respondent, ROYAL INDEMNITY COMPANY, respectfully requests this Court decline to review the cause here presented and deny petition for writ of certiorari.

Respectfully submitted,

ANNE CAWTHON BOOTH
Post Office Box 1388
Tallahassee, Florida 32302

JOHN LEWIS HALL, JR.
Post Office Drawer 840
Tallahassee, Florida 32302

Attorneys for Respondent, Royal Indemnity Company

APPENDIX No. 1

IN THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT, STATE OF FLORIDA.

DOCKET NO. R-190

CHARLES FRIEND,
Appellant,

vs.

ROYAL INDEMNITY COMPANY, et al,
Appellees.

PETITION FOR REHEARING

Plaintiff-appellant petitions respectfully, pursuant to Rule 3.14, that this Court reconsider its opinion filed herein on April 24, 1973, and that upon reconsideration the Court grant rehearing, further argument or such further proceedings as may be allowed by the Rules and helpful to this Court, and as grounds for said petition would show the following:

I

This Court may have overlooked the fact that there has never been an evidentiary hearing in this case. There is no allegation in the Complaint (or amendments) that plaintiff was an employee protected by the Career Service Act. There was no answer, counterclaim or affirmative defense filed which might place this fact in issue. Plaintiff's complaint sounded in tort and did not rely in theory upon the administrative benefits of the Career Service Act. There was no evidence taken on this point, there was no stipulation entered. Upon such a record a "finding" of the Circuit Judge was a departure from the requirements

of procedural due process, in that he found the plaintiff was not entitled to the protection of the Act. The absence of all the foregoing incidents of an orderly proceeding should certainly prevent such a "finding" from being binding on any of these parties.

The requirements of the exemption statute referred to require a factual showing in two respects: There must be an "employee" who makes policy, and there must be a proper designation of the exemption by the Cabinet officer. (See Sec. 110-051 (2) (h), Florida Statutes 1969.) Such judicial action without an opportunity to present evidence violates the most elementary principles of procedural due process as guaranteed by the Bill of Rights and the Constitution of Florida, Article I, Sec. 9.

Said finding was not openly and directly attacked by plaintiff (appellant) because plaintiff mistakenly believed that there was no serious dispute concerning the law of Florida which requires public officers and employees to respond to injured persons for torts committed under color of office, and which tortious conduct is malicious, unlawful, grossly neglectful or clearly beyond the powers of his office. (These circumstances were among the allegations of the amended complaint below.) As will be demonstrated here, this mistake should not necessarily prejudice plaintiff, because opposing counsel, the Attorney General, is guilty of the same "mistake."

Plaintiff respectfully suggests, therefore, that both sides have been surprised by the Court's ruling, and until now there had been no necessity in law to pursue the question of career service protection. If the law of Florida is as announced in the recent opinion, then basic fairness requires that plaintiff be given a reasonable opportunity to plead and prove that he was sheltered by the merit system, and terminated unlawfully.

If, on the other hand, there may be a cause of action in tort against state employees or officers under proper circumstances, we urge that the Court's recent opinion should be re-visited. The mistaken arguments or conflicting positions of the Attorney General are explained more fully below.

II

That portion of this Court's opinion dealing with the doctrine of Sovereign Immunity, and which quotes from the brief of the Attorney General, is surprising to say the least. Plaintiff has argued that question in his briefs and does not presume to re-argue the same point here. Plaintiff is surprised, however, that counsel could brief and argue so convincingly, as recently as March 13th, 1973: that all state employees and officers are immune from tort liability while acting under color of office; when during the same period of time the Attorney General's staff prepared and published to the State Board of Regents an opposite - and contradictory - opinion. We refer particularly to O.A.G. No. 073-130 dated April 20, 1973, and entitled:

> "re: State Immunity—application to officers and employees of the state university system."

Said opinion restates the law of Florida according to plaintiff's understanding, and in a position of obvious harmony with the brief of this plaintiff. An example or two are quoted from said opinion No. 073-130:

> ". . . It is important to note at this point that the doctrine of sovereign immunity protects only the *state*. It does not protect individual officers or employees from *personal* judgments for acts committed within the scope of their official duties. . . ."

* * *

"It should be noted, however, that since the immunity which the state governmental boards and agencies enjoy is an attribute of the state's sovereignty, it may not be invoked by public officers and employees when they are sued for their own negligence or other torts, and public officers and employees may be individually liable for their negligent or other tortious acts even when such acts occur within the scope of their authority and official duty. 63 Am.Jur. 2d, Public Officers and Employees, Section 293; 67 C.J.S., Officers, Section 125; 26 Fla. Jr., Public Officers, Section 120. Moreover, when an officer or employee of the state university system goes beyond the scope of his authority or duty, or exceeds the power conferred on him by law, he is not entitled to the protection of his office and is liable for his acts as is every private individual. A plea that he was a public agent acting under color of his office will not shield him from liability. AGO 060-81; 67 C.J.S., Officers, Section 126; 63 Am.Jur. 2d, Public Officers and Employees, Section 291; and 26 Fla. Jur., Public Officers, Section 118."

* * *

". . . As a general rule public officials are not personally liable for the negligent performance of discretionary duties in the absence of a showing of gross neglect of duty or a wilful and malicious exercise of power. 63 Am.Jur. 2d, Public Officers and Employees, Section 293. . . ."

* * *

". . . However, the rule of respondeat superior will be applicable where such officers participate in or direct that tortious act of a subordinate since the act is in contemplation of law the act of the superior. 81 C.J.S., States, Section 84; 63 Am.Jur. 2d, Public Officers and

Employees, Section 295. Accord, AGO 060-81, and AGO 072-207."

The Attorney General summarizes as follows:

"

SUMMARY

Public officers and their subordinates, whether full- or part-time, are not individually liable in private actions for the consequences of official acts which are performed while such individuals are acting in good faith and within the course and scope of their authority or official duty. However, all employees of the state university system may be individually liable for their tortious acts, or for acts in excess of their legal authority or outside the scope of their legal authority and official duty.

Sincerely,

/s/ Robert L. Shevin
Robert L. Shevin
Attorney General "

A copy of said Opinion OAG 073-130 in its entirety is attached to this petition for further reference. The Court will observe that the addressee of that opinion is instructed contrary to the rule of law announced in this Court's recent opinion. For this reason alone reconsideration and further explaination or argument seem necessary.

The effect of said opinion upon the university system, and all other state agencies and officers, is not to be underestimated. The opinions of our Attorney General are the law of the land to all state employees in those areas where the legislature or the Courts have not clearly spoken. The Attorney General, himself, has instructed his addressees of the effect of such opinions upon the conduct of state employees:

"Attorney General opinions, while not binding on Courts, are entitled to weight in construing Florida statutes, and are guides for state executives and administrative officers in performing their official duties until superceded by judicial decision." O.A.G. 073-43, March 5, 1973.

CONCLUSION

The Attorney General of Florida has, apparently, officially advised state officers and agencies that the law of Florida is contrary to the rule announced in this Court's opinion of April 24, 1973. His advice was published within several days of this Court's opinion to the contrary. Of course, even the Attorney General admits that his opinions are subject to being overruled by judicial action. The present difficulty is not so easily resolved because both positions are based upon the research, advice, and recommendations of opposing counsel, the Attorney General. We are certain that either Chancellor Mautz or this Honorable Court has been misadvised. Each has apparently relied upon said advice and opinions. The obvious contradiction presented should be considered and resolved for the good of the state university system, to preserve the integrity of the Court and, incidentally, to prevent a serious injustice upon this plaintiff.

Respectfully submitted,

/s/ Robert B. Kane
Robert B. Kane
Post Office Box 124
Tallahassee, Florida
Attorney for Plaintiff-Appellant

APPENDIX No. 2

SUPREME COURT OF FLORIDA
JULY TERM, A. D. 1973

FRIDAY, SEPTEMBER 28, 1973

CASE NO. 43-997

CHARLES FRIEND,
Petitioner,

vs.

IRWIN R. LIPPMAN, THOMAS A. WADDELL and THOMAS D. O'MALLEY, JR., individually and as Insurance Commissioner and Treasurer of Florida, and ROYAL INDEMNITY COMPANY, etc.,
Respondents.

DISTRICT COURT OF APPEAL, FIRST DISTRICT
R-190

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

CARLTON, C.J., ROBERTS, ERVIN, ADKINS and BOYD, JJ., concur

Y

CC: Hon. Raymond E. Rhodes, Clerk
Hon. Paul F. Hartsfield, Clerk
Hon. Guyte P. McCord, Jr.,
Judge

Hon. Robert B. Kane
Hartwell and Hall
(Hon. J. Lewis Hall, Jr.)
Hon. Scott R. Nabors
Bryant, Dickens, Rumph, Franson
and Miller
(Hon. Ben H. Dickens)

APPENDIX No. 3

110.051 Career service; exemptions.—*

(1) CAREER POSITIONS.—The career service to which this chapter shall apply shall include all positions not specifically exempted by this chapter or by rules adopted pursuant to this chapter, any provisions of the Florida Statutes to the contrary notwithstanding.

(2) EXEMPT POSITIONS.—The exempt positions which shall not be covered by this chapter shall include the following:

(a) Officers elected by popular vote and persons appointed to fill vacancies in such offices.

(b) Officers and employees of the legislature.

(c) Members of boards and commissions and the head of each state agency, board or commission, however selected; provided, however, that the department shall set the salary of these positions unless otherwise fixed by law.

(d) Judges, referees, receivers.

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*Official Florida Statutes 1969, §110.051 as it read on the date of Petitioner's discharge.

(e) The chancellor of the university system and the presidents of state colleges and universities, provided that the salaries for such positions shall be set by the board of regents, any provisions of the Florida Statutes to the contrary notwithstanding. Members of the teaching and research faculty of the state university system and comparable administrative and professional positions as determined by the board of regents.

(f) Patients or inmates in state institutions.

(g) Any person paid from other personal services appropriations.

(h) *Policy-making employees and the secretaries to each in the offices of secretary of state, attorney general, comptroller, treasurer, commissioner of education and commissioner of agriculture as exempted by each aforementioned officer; provided, however, that the department shall set the salary of these positions unless otherwise fixed by law.*

(i) All employees in the governor's general office; provided, however, that the department shall set the salary of these positions unless otherwise fixed by law.

(j) All officers and employees of the judicial branch of state government; provided, however, that the department shall set the salary of these positions, unless otherwise fixed by law.

(k) The appointed secretaries and executive directors of all departments and, unless otherwise provided, the directors of all divisions of such departments.

History.—§5, ch. 67-437; §1, ch. 69-300; §§4, 5, ch. 69-343; §§4, 31, 35, ch. 69-106.

APPENDIX No. 4

Florida Constitution Art. V §4

§ 4. Supreme Court

(1) *Organization.* The supreme court shall consist of seven members, one of whom shall be the chief justice. Five justices shall constitute a quorum, but the concurrence of four shall be necessary to a decision.

(2) *Jurisdiction. Appeals from trial courts may be taken directly to the supreme court, as a matter of right,* only from judgments imposing the death penalty, *from final judgments or decrees directly passing upon the validity of a state statute or a federal statute or treaty, or construing a controlling provision of the Florida or federal constitution,* and from final judgments or decrees in proceedings for the validation of bonds and certificates of indebtedness. The supreme court may directly review by certiorari interlocutory orders or decrees passing upon chancery matters which upon a final decree would be directly appealable to the supreme court. In all direct appeals and interlocutory reviews by certiorari, the supreme court shall have such jurisdiction as may be necessary to complete determination of the cause on review.

Appeals from district courts of appeal may be taken to the supreme court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution. The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest,

or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law. (Emphasis supplied)

APPENDIX No. 5

No less an authority than perhaps the largest employer of teachers in Florida, the State Board of Education, complies with the *Pred* and similar cases. See *Constitutional Rights and Non-Renewal of Faculty Contracts,* by Rivers Buford, Jr., General Counsel, Florida State Board of Education, Tallahasse (A 1), detailing how and why the state of Florida places its teachers in three categories:

The first category is of teachers with continuing contracts or tenure.

The second category is of teachers with no continuing contracts and no tenure, but an "expectancy of continued employment" because of actions of their employers.

Teachers in these two categories, says the Board of Education, "occupy the same position" and to terminate one of them, the employer must give the teacher notice of cause for termination and the opportunity for a hearing.

The status of the plaintiff here was the same as those persons in the second category because he had an expectancy of continued employment, which is implicit in the allegations in Paragraphs 11 (a) through (d) and 9 (a) (4) of the amended complaint (R 20 to 23). So with regard to public employees without tenure or any contractual rights,

the official policy of one executive department of the state concedes it must afford those employees who are in the second category due process. This is the same as saying it is the official policy (Petitioner's first brief in District Court of Appeals p. 33) (page 35 is omitted) asserted his willingness and ability to prove his allegations. We submit he also has stated a cause of action.

The trial court should be reversed here, as it was in the *Pred* case. The *Pred* case held that at stake was the vindication of the constitutional right not to be punished by the state or suffer retaliation at its hands because a public employee (not just a teacher) persists in the exercise of constitutional rights.

So we have, clearly and unequivocally, the state of Florida agreeing it is obliged to afford due process to its public *employees* who do not have tenure or continuing contracts or an expectancy of continued employment. If, then, *tenure, a continuing contract of employment, an expectancy of continued employment,* civil service status, career service status, job security, a specific term of office, etc., are treated correctly by O'Malley as equivalents, which he does and which they are, and if a public employee without any one of the equivalents underscored above is entitled to due process and relief, there cannot be any real doubt that a public employee lacking in one of the other equivalents, as for example, career service status, is entitled to the same due process and relief. The presence or absence of career service status, as was said of contractual rights, is immaterial.

In *State* vs. *City of Miami Beach*, 97 So.2d 349 (Fla. App. 1957), the plaintiff had civil service status. HERE THE PLAINTIFF HAD NO CAREER SERVICE STATUS. Since the * * * (Petitioner's First Brief in District Court of Appeal, page 36).

APPENDIX No. 6

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA.

CASE NO.: 71-1649

CHARLES FRIEND,
Plaintiff,

vs.

IRWIN R. LIPPMAN, THOMAS A. WADDELL and THOMAS D. O'MALLEY, JR., individually and as Insurance Commissioner and Treasurer of Florida, and ROYAL INDEMNITY COMPANY, a foreign corporation,
Defendants.

COMPLAINT

The plaintiff sues the defendants and alleges:

COUNT ONE

1. The plaintiff and the defendants, LIPPMAN, WADDELL and O'MALLEY, are residents of Leon County, Florida. The defendant, ROYAL INDEMNITY COMPANY, is a New York Corporation doing business in Florida.

2. During 1970 and January, 1971, the plaintiff was Director of the Division of Rehabilitation and Liquidation of the Florida Department of Insurance.

3. During 1970 and January, 1971, the defendant LIPPMAN was Director of the Division of Personnel of the Florida Insurance Department.

4. During 1970 and January, 1971, the defendant WADDELL was General Counsel of the Florida Department of Insurance and, as such, was the plaintiff's immediate superior. The defendant WADDELL was also the plaintiff's immediate superior during the last eight months (May through December) of 1969.

5. On November 3, 1970, the defendant O'MALLEY was elected Insurance Commissioner and Treasurer of Florida, and on January 5, 1971, he was inaugurated as such, and he has continued as such to date.

6. Between November 3, 1970, and January 31, 1971, the defendant LIPPMAN

a) without just cause intentionally falsely informed against the plaintiff to the defendant O'MALLEY, causing the defendant O'MALLEY to discharge the plaintiff from his employment; and/or

b) without just cause, deliberately and knowingly, ordered, instructed and requested plaintiff to violate and to participate in the violation of statutes, court orders, rules and regulations (or all of the foregoing) of the State of Florida and to improperly falsify official records of the State of Florida; and/or

c) informed the defendant O'MALLEY that the plaintiff refused to countenance or knowingly participate in deliberate violations of court orders, statutes or rules and regulations (or all of them) of the State of Florida; and that the plaintiff refused to countenance or knowingly participate in the deliberate and improper falsification of official records,

causing the defendant O'MALLEY to discharge the plaintiff from his employment.

7. As a result of such acts of the defendant LIPPMAN, the plaintiff has lost and will lose earnings, retirement benefits and sick and annual leave benefits.

COUNT TWO

8. The plaintiff realleges the allegations in paragraphs 1 through 5 of Count One.

9. The plaintiff alleges against the defendant WADDELL the same allegations asserted against the defendant LIPPMAN in paragraphs 6 and 7 of Count One.

COUNT THREE

10. The plaintiff realleges the allegations in paragraphs 1 through 5 of Count One.

11. As a result of the acts of the defendants LIPPMAN and WADDELL, set forth in Counts One and Two, the defendant O'MALLEY on an unreasonably arbitrary basis on January 18, 1971, discharged the plaintiff from his employment, which discharge became effective on January 31, 1971.

12. The plaintiff alleges against the defendant O'MALLEY the same allegations asserted against the defendant LIPPMAN in paragraph 7 of Count One.

COUNT FOUR

13. The plaintiff realleges the allegations contained in paragraphs 1 through 5 of Count One.

14. Between November 3, 1970, and January 18, 1971, inclusive, the defendants LIPPMAN and WADDELL intentionally conspired with each other to wrongfully procure the plaintiff's discharge from his employment, and in furtherance of that conspiracy performed those acts alleged in paragraph 6 a), b), and c), thereby causing the

defendant O'MALLEY to discharge the plaintiff from his employment.

15. As a result of such acts of the defendants LIPPMAN and WADDELL in combination, the plaintiff has been damaged as alleged in paragraph 7 above.

COUNT FIVE

16. Plaintiff realleges the allegations contained in paragraphs 1 through 5.

17. Between November 3, 1970, and January 31, 1971, the defendants LIPPMAN, WADDELL and O'MALLEY agreed and conspired and planned to expend certain public funds or trust funds, contrary to court orders and they each performed acts in furtherance of said plan.

18. Plaintiff was directed to participate in said conspiracy by said defendants, but he refused.

19. Because of plaintiff's refusal to participate in said conspiracy the defendants LIPPMAN and WADDELL took actions as alleged in paragraph 6 of Count One.

20. Because of plaintiff's refusal to participate in said conspiracy, the defendant O'MALLEY took actions as alleged in paragraph 11 of Count Three.

21. The defendants, LIPPMAN, WADDELL and O'MALLEY, conspired to damage the plaintiff in his employment and took the aforesaid acts in furtherance of said conspiracy.

22. As a result of said conspiracy, and as a result of the unlawful and tortious acts, of the said three conspirators, the plaintiff has been damaged as alleged in paragraph 7 of Count One.

COUNT SIX

23. The plaintiff realleges the allegations of paragraphs 1 through 5 of Count One.

24. On or about December 1, 1970, the defendant O'MALLEY bound himself in the penal sum of ONE HUNDRED THOUSAND DOLLARS ($100,000.00) to the Governor of Florida, the condition of said bond being that he shall faithfully perform the duties of his said office.

25. The defendant, ROYAL INDEMNITY COMPANY (hereafter ROYAL), a foreign corporation, bound itself in like amount as surety upon the aforesaid obligation of the defendant O'MALLEY. A true copy of the written obligation or Bond, executed by the defendants O'MALLEY and ROYAL is attached hereto and marked for identification as Plaintiff's Exhibit I.

26. Said Bond has remained in force and effect at all times since its execution as aforesaid through the filing of this Complaint.

27. Plaintiff realleges all allegations of paragraphs 6 and 7, as to defendants LIPPMAN and WADDELL.

28. Plaintiff realleges all allegations of paragraphs 11 and 12 as to the defendant O'MALLEY.

29. The acts described in paragraphs 6, 11, 14, 17, 18, 19, 20, 21 and 22 were done in the official capacity of the said individual defendants, and/or they were done under the color of office of the said defendants, and/or with the authority of the said offices of said defendants.

30. The acts described in paragraphs 6, 11, 14, 17, 18, 19, 20, 21 and 22 were unfaithful to the office of said defendants. The said acts constitute a breach of public trust by said defendants. Said acts constitute a breach of the

condition of said Bond by each of the said individual defendants.

31. As a result of said acts plaintiff has been damaged as alleged in paragraph 7 of Count One.

32. As a result of the aforesaid unlawful and tortious acts of each of the defendants, the surety, ROYAL, has become liable and obligated to plaintiff for his damages as aforesaid.

33. All conditions precedent to bringing suit upon said Bond have been performed by plaintiff.

WHEREFORE, the plaintiff demands judgment against the defendants, and each of them, for compensatory damages in excess of the minimum jurisdictional amount of this Court, and punitive damages in excess of the minimum jurisdictional amount of this Court, and demands trial by jury.

/s/ Robert B. Kane
Robert B. Kane
Attorney for Plaintiff
604 Midyette-Moor Building
Tallahassee, Florida 32301

APPENDIX No. 7

Point II Whether the Amended Complaint Has Alleged the Violation of a Constitutionally Protected Right of Plaintiff.

Appellant believes that Appellees have misconstrued the obvious meaning of the authorities. THE RIGHT WHICH WAS TAKEN FROM PLAINTIFF WAS NOT A CONTRACTUAL OR STATUTORY RIGHT TO EMPLOY-

MENT. It was a constitutional right to be free from threats or retaliation by his superiors for exercising his basic rights. The arguments of opposing counsel seem identical to those advanced in *Pred* v. *Board of Public Instruction*, 415 F. 2d 851 (5 CCA-Fla. 1969). That opinion mentions counsel's alleged distinction between a contract being terminated prematurely, and one which has expired not being renewed. The court observed that such argument attempts to dilute a constitutional right to a contractual one. The opinion describes the basis for the cause of action and Judge Brown might just as well have been talking about the facts of the present case:

> "(4) Equally unpersuasive is the related argument that since there is no constitutional right to public employment, school officials only allowed these teacher's contracts to expire, and thus they cannot be liable for any rights protected by Sec. 1983. But in the posture of this case this misconceives the whole thrust of their claim. The right sought to be vindicated is not a contractual one, nor could it be since no right to * * * (Petitioner's Reply Brief in District Court p. 8.)

APPENDIX No. 8

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 71-1649

CHARLES FRIEND,
Plaintiff,

vs.

IRWIN LIPPMAN, et al,
Defendant.

MOTION TO AMEND COMPLAINT

Plaintiff moves, pursuant to Rule 1.190, for leave to amend his Complaint, and for grounds would show:

1. Plaintiff believes that facts and transactions occurring outside of the times mentioned in his Complaint are material or necessary to perfect his cause of action, and he wishes to have an opportunity to present such evidence;

2. This Court has ruled on January 19, 1972, that plaintiff could not make discovery outside of the times mentioned in his Complaint. Such discovery is or may be necessary to properly present plaintiff's case.

3. Such amendments do not work any substantial change in this cause of action and will not cause surprise or prejudice to the defense.

4. Therefore, plaintiff prays that his Complaint filed on November 24, 1971, be amended as follows:

a) Paragraph No. 6, first line, change by interlineation to read:

"6. Between January 1, 1970, and November 23, 1971, the"

b) Paragraph No. 14, first line, change by interlineation to read:

"14. Between January 1, 1970, and November 23, 1971,"

c) Paragraph No. 16 be changed in its entirety to read as follows:

"17. Between January 1, 1970, and November 23, 1971, the defendants Lippman and Waddell agreed and conspired and planned to expend certain public funds or trust funds, contrary to court orders and contrary to law and they each performed acts in furtherance of said plan. The defendant O'Malley entered into said conspiracy on or after September 8, 1970, and thereafter performed acts in furtherance of said plan."

5. Plaintiff further prays that all references to said numbered paragraphs in the original complaint or thereafter in this suit be construed to refer to the said paragraphs as amended.

/s/ Robert B. Kane
Robert B. Kane
Attorney for Plaintiff
604 Midyette-Moor Building
Tallahassee, Florida 32301

I CERTIFY THAT A COPY of the foregoing Motion to Amend Complaint was mailed to the following on this 25th day of January, 1972:

Ben H. Dickens, Esquire
700 Tallahassee Bank Building
Tallahassee, Florida 32301

and

J. Lewis Hall, Jr., Esquire
P. O. Drawer 840
Tallahassee, Florida 32302

/s/ Robert B. Kane

APPENDIX No. 9

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA.

CASE NO. 71-1649

CHARLES FRIEND,
Plaintiff,

vs.

IRWIN LIPPMAN, et al,
Defendants.

ORDER

This cause came on for hearing and argument upon all pending motions. After hearing the arguments of counsel and upon consideration, it is ORDERED and ADJUDGED as follows:

1. Motion of plaintiff to amend his complaint is granted without objection by the parties;

2. Motion to dismiss for lack of jurisdiction of the person of the defendant, THOMAS D. O'MALLEY, individually, is denied;

3. Motion of defendant, ROYAL INDEMNITY COMPANY, to dismiss for insufficiency of process and service of process is denied by the court after agreement by counsel;

4. The motion of the individual defendants to sever is postponed for hearing at a later date to be set by the court; and

5. Other pending motions are taken under advisement by the court. Plaintiff may file his written memorandum directed to said motions on or before February 14, 1972.

DONE and ORDERED at the Courthouse this 4th day of February, 1972.

/s/ Guyte P. McCord Jr.
Circuit Judge